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IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
MR JUSTICE LIGHTMAN
[2004] EWHC 12 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 24th February 2004

Before :

LORD JUSTICE PETER GIBSON
LORD JUSTICE CARNWATH
and
MR JUSTICE BLACKBURNE

- -

Between :

OXFORDSHIRE COUNTY COUNCIL	**Appellant**
- and -	
OXFORD CITY COUNCIL AND CATHERINE MARY ROBINSON	**Respondents**

- -

George Laurence QC and Ross Crail (instructed by **The Solicitor to Oxfordshire County Council**) for **Oxfordshire County Council**
Charles George QC and Philip Petchey (instructed by **City Secretary and Solicitor, Oxford City Council**) for **Oxford City Council**
Douglas Edwards and Jeremy Pike instructed by **Public Law Solicitors King Edward Chambers Birmingham for Catherine Mary Robinson**
Hearing dates : 17th to 20th January 2005

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Carnwath:

Background

1. The traditional village green needs no introduction:

> "'Village green' – the very words are evocative of great age and tranquillity, of turf as rich in hue as it is trim in a setting untouched by time"[1]

> "…the traditional village green with its memories of maypole dancing, cricket and warm beer."[2]

More prosaically, Gadsden describes the popular perception:

> "In popular language, the village green… is a small area of open land in the middle of a village where the inhabitants can rest or play, the children run round and, archetypally, the village cricket team holds its matches."[3]

2. The story of the "Trap Grounds" is rather different. According to the Inspector's[4] report, the name has been traced back to 1790, but its origin is unknown:

> "It may derive from the use of the land for trapping birds or eels, for parking horse drawn traps attending the annual horse races in Port Meadow which took place until 1880, or for dumping night soil from college privies or 'traps'"

The land consists of 9 acres of undeveloped land in North Oxford, between the railway to the west and the towpath of the Oxford Canal to the east. Beyond the canal to the east lies the residential area forming the parish of St Margaret's. For a long time the land was owned by St John's College who used part as a refuse tip. In 1975 it was sold to the Oxford City Council, who wish to use it for housing development.

3. As for its physical features, about one third on the eastern side (referred to as "the reed beds") is permanently under water, and inaccessible to ordinary walkers. The remainder consists of trees and a scrubby undergrowth ("the scrubland"). The land is approached by a bridge over the canal along a track known as Frog Lane, which leads along the northern edge of the reed beds and gives access to a circular path around the scrubland, off which there are numerous small paths through the undergrowth. The inspector observed that the scrubland "bore the marks of its former use as a dump for builders' rubble", but that since the 1970s "the land was left neglected to grow vegetation on and around the rubble".

4. He found evidence of use by local people for "dog-walking, children's play and general informal recreation". He estimated that a total of about 25% of the scrubland is "reasonably accessible to the hardy walker". Understandably most of the activity

seems to have been on or around the circular path. Mr Statham's evidence is an example:

> "Between 1989 and 2001, he had dogs and walked them on the Trap Grounds several times a week. He usually did a circular walk around the scrubland, going off the path to retrieve his dogs, to pick blackberries in season and to admire some striking giant hogweed in the south western sector of the scrubland in the spring and summer…"

The inspector described the land as:

> "…a typical case of institutionally owned land on the urban fringe which is neglected by the landowner because it has long term development plans and which attracts use by local people for informal recreation."

The application

5. Miss Robinson is a local resident. In June 2002 she submitted an application to register the Trap Grounds as a "town or village green" under section 13 of the Commons Registration Act 1965. She claimed that it had become a town or village green by 1st August 1990, by virtue of the fact that:

> "…local residents had used it for lawful pastimes as of right (without obstruction, permission, stealth or force) for an unbroken period of 20 years. They continue to do so until the present day".

The application form required her to state the "locality", which she gave as "the Parish of St Margaret, Central North Oxford". She attached a plan showing the Trap Grounds edged in green and the parish in red. Although she filled in the form herself she was helped by a publication of the Open Spaces Society," Getting Greens Registered". She later attempted to amend the application by excluding certain areas.

6. The City Council as landowners objected to the application. The County Council, as registration authority, had the task of deciding whether to amend the register. They appointed Mr Vivian Chapman, a specialist barrister, to hold a non-statutory inquiry. He advised that the register should be amended to include the Trap Grounds as a town or village green, but excluding the reed beds (because they were inaccessible for ordinary recreation) and the track known as Frog Lane (because it had been used for access rather than recreation). The County Council received conflicting advice on certain points from Mr Laurence QC, another specialist in this field. It became apparent that the resolution of this dispute raised some fundamental questions about the interpretation and practical application of the 1965 Act on which a determinative ruling from the courts would be required. Accordingly the County Council itself initiated the present proceedings with a view to obtaining rulings on the questions which it considered material. The proceedings were commenced by the County Council by claim form dated 11th June 2003, naming the City Council and Miss Robinson as defendants.

7. Meanwhile, in the early part of 2003, the City Council had put up on the Trap Grounds notices in the following terms:

> "Oxford City Council
> Trap grounds and reed beds
> Private property
> Access prohibited
> Except with the express consent
> Of Oxford City Council"

The purpose of this was to put an end to the period of qualifying use, by ensuring that it could no longer be "as of right".

The Commons Registration Act 1965

8. The principal purpose of the 1965 Act, as appears from the long title, was

> "…to provide for the registration of common land and of town and village greens…"

9. Section 1(1) required the registration of (a) land in England and Wales which was "common land or a town or village green"; (b) rights of common over such land; and (c) those claiming rights of ownership over such land, or becoming owners by virtue of the Act. Certain terms were defined by section 22, which applied "in this Act, except where the context otherwise requires". "Common land" was defined as land subject to common rights, or "waste land of a manor" not subject to such rights, but excluding any "town or village green". The definition of "town or village green" (adopting the accepted, but non-statutory, division into three classes) -

> "land [a] which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [b] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or [c] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years."

10. Registration authorities were established with the duty to "maintain" the registers, and to make them open to inspection by the public at all reasonable times (s 3). The Act provided machinery for "provisional registrations" (s 4), for objections (s 5), and for reference of disputed claims to the Commons Commissioner (an office specially established by the Act for this purpose) (s 6). In the case of town or village greens, if no other ownership claim was established, the land was to be registered in the name of the relevant district council (s 8(3)). Registrations had to be made in accordance with "Model Entries" provided by the Commons Registration (General) Regulations 1966. It is to be noted that the register had to record simply the status of the "land" as a town or village green, not the particular class of the definition under which it had acquired registrable status.[5]

11. By section 1(2), after the end of a period prescribed by the Minister (in the event, 31st July 1970), no land capable of being registered under the Act "shall be deemed to be

common land or a town or village green unless it is so registered"; and no rights of common "shall be exercisable" unless registered "under this Act or the Land Registration Acts". Conversely, section 10 provided:

> "The registration as a common land or as a town or village green, or of any rights of common over such land, shall be conclusive evidence of the matters registered, as at the date of registration, except where the registration is provisional only."

12. It should be noted at this point that, in spite of previous judicial disagreements, the effect of section 1(2) is no longer in issue. The question was whether or not it had the effect that any rights of local inhabitants which were registrable but unregistered by 31st July 1970 were extinguished. Lightman J decided that they were extinguished. He noted also that this view was consistent with the Ministerial statements at the time.[6] I expressed the same view of the section at first instance in *Steed*:

> "… whatever rights may have been thought to exist by virtue of actions or events before 1970, they ceased to have effect. Thereafter the land was deemed not to be a 'town or village green', within any of the three parts of the definition".[7]

In the Court of Appeal in *Steed*, Pill LJ (obiter) disagreed. He took the view that existing customary rights could survive non-registration. He quoted with approval the reasoning in an Opinion of Mr Laurence QC for the Countryside Commission.[8] However, Mr Laurence himself frankly told us that he no longer felt able to support his previous Opinion (for reasons he explained to us). In any event, the correctness of the Lightman J's conclusion on this point is not in issue before us. Accordingly, without disrespect to Pill LJ, I will proceed on the basis that it is correct.

13. Returning to the statute, separate provision was made for amendment of the register to take account of future changes. Section 13 of the 1965 Act stated that regulations should provide for amendment of the register: (a) where any land registered under the 1965 Act "ceases to be common land or a town or village green"; or (b) where any land "becomes common land or a town or village green"; or (c) any registered rights are varied or extinguished.

14. Provision for amendment was accordingly made by the Commons Registration (New Land) Regulations 1969 ("the 1969 Regulations"). The main points are:

    i) Where "after the 2nd January 1970 any land becomes common land or a town or village green", an application may be made for inclusion of the land in the appropriate register (reg 3(1)). The application may be made by any person (reg 3(4).

    ii) The application must be made to the registration authority for the area in the prescribed form (Form 30), accompanied by a statutory declaration and all relevant documents in the applicant's possession, under the applicant's control or of which the applicant has the right to production (reg 3(7), 4(1)).

iii) The authority may reject the application after preliminary consideration if it appears "not to be duly made", but where it appears to the authority "that any action by the applicant might put the application in order" they must first give the applicant a reasonable opportunity to take that action (reg 5(7)).

iv) Otherwise the authority must notify likely objectors (including owners, tenants and occupiers of the land in question) and publish and display notices of the application in the area, inviting objections by a specified date (reg 5(4)). It must then consider the application and any objections, and give the applicant an opportunity to respond (reg 6).

v) The regulations contain no provision for formal hearings. However, it is accepted that, as part of its implied duty to act fairly in deciding the application, the authority may find it necessary to arrange an informal oral hearing. For this purpose, a practice has developed of arranging a non-statutory public inquiry before a specialist lawyer (as in this case).

vi) Whether or not such an inquiry is held, it is for the authority to decide on the available material whether to accept the application and make the registration, or reject it (regs 7-8). Unlike section 6 of the Act (which provided specifically for confirmation of a provisional registration by the Commons Commissioners "with or without modifications"), the 1969 Regulations make no express provision for amendment or modification of the application before registration.

vii) Where the application is accepted, the registration authority must make the necessary registration following as closely as possible the appropriate Model Entry in the 1969 Regulations. The relevant model entry includes a reference to the fact that the entry is made pursuant to an application under section 13 (rather than a provisional registration under section 4).

15. The Commons Commissioners have no function in respect of amendments, and there is no other statutory adjudication machinery. However, supervision by the High Court is provided by section 14 of the 1965 Act. This gives the court power to order the register to be amended, if, following an amendment under section 13, it appears to the Court that no amendment or a different amendment ought to have been made and that rectification would be just. As the judge observed (and has since been confirmed by this court in *R (on the application of Whitmey) v Commons Commissioners*[9]), the availability of this remedy (as well as, where appropriate, judicial review) renders the procedure compliant with Article 6 of the European Convention on Human Rights.

16. Finally, it is necessary to refer to the amendment to the definition of class *c* greens made by section 98 of the Countryside and Rights of Way Act 2000 ("the 2000 Act"), which had come into force by the time of Miss Robinson's application. As from 30th January 2001, the original definition of a class *c* green is substituted by a reference to land falling within a new subsection (1A):

> "(1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a

> locality, have indulged in lawful sports and pastimes as of right, and either—
>
> (a) continue to do so, or
>
> (b) have ceased to do so for not more than such period as may be prescribed or determined in accordance with prescribed provisions."

17. Three points should be made at this stage about this amendment. First, the 2000 Act contains no transitional provisions dealing with the position of applications made before 31st January 2001, or of later applications based on use partly before and partly after that date. Secondly, there are as yet no "prescribed provisions" under sub-paragraph (b), which therefore has no practical effect.[10] Thirdly, the Act made no corresponding provision for the inhabitants of the neighbourhood or locality to enjoy any *rights* over class *c* greens. (By contrast, section 2 of the same Act for the first time gave the public a right of access "for the purposes of open-air recreation" to various categories of land. The categories included registered common land, but not village greens.)

18. In the remainder of this judgment I shall distinguish between "historic" and "modern" class *c* greens. The former term I shall use for class *c* greens which qualified for registration by virtue of a period of 20 years use as of right (which I shall call a period of "qualifying use") prior to the relevant date for the initial registrations. The latter are those for which the period of qualifying use ended after that date, and which therefore are only registrable (if at all) by amendment of the register under section 13.

The issues

19. In these proceedings the County Council, as registration authority, seek "rulings" or "guidance" from the court on a list of ten issues (which I take from Mr Laurence QC's summary). It is convenient to divide them into five groups:

    a) Substantive effect of class *c* registration

        i) whether the relevant inhabitants have rights to indulge in lawful sports and pastimes on land which has become (within the meaning of section 13 of the 1965 Act) a class c green;

        ii) whether land which has become (within the meaning of section 13 of the 1965 Act) a class *c* green falls within the scope of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876;

    b) The effect of the 2000 amendment

        iii) the meaning of the words *"continue to do so"* in the amended definition, for which purpose the court was asked to rule whether (in the absence of regulations made under section 22(1A)(b) of the 1965 Act) the lawful sports and pastimes must

continue up to (a) the date of the application to register or (b) the date of registration or (c) some other (and if so what) date;

iv) whether all applications for registration of land as a class *c* green made on or after 30 January 2001 automatically engage (and engage only) the amended definition;

c) "Free-standing" periods of use

v) whether the application could as a matter of law (if supported by appropriate facts) succeed on the basis stated by Miss Robinson in Part 4 of her application, namely that the land became a green on 1 August 1990, or whether (subject to (vi) below) an application which specifies in Part 4 a date earlier than the date immediately preceding the date of the application must fail;

d) Amendments to the application

vi) whether the County Council has power (the City Council not objecting) to treat the application as if a different date (namely a date immediately preceding the date of the application) had been specified in Part 4, and to determine the application on that basis;

vii) whether as a matter of law it is open to the County Council to permit the application to be amended so as to refer to some lesser area (such as by excluding the part known as "the reed beds" and/or a 10 metre strip along the western boundary of the part known as "the scrubland"), and if so, according to what criteria;

viii) whether as a matter of law it is open to the County Council (without any such amendment being made) to accept the application in respect of, and to register as a green, part only of the land included in the application, such as the part known as "the scrubland", and if so, according to what criteria;

e) Evaluation of evidence

ix) how the County Council should approach the application in the light of the evidence reported by the Inspector in relation to user of the main track and subsidiary tracks and his estimate that only about 25% (or less) of "the scrubland" is reasonably accessible; and

x) the relevance of the existence or potential for the existence of public rights of way.

The role of the Court

20. President Barak, President of the Supreme Court of Israel, recently described the respective roles of a supreme court and a court of appeal:

> "The primary concern of the supreme court in a democracy is not to correct individual mistakes in lower court judgments. That is the job of courts of appeal. The supreme court's concern is broader, system-wide corrective action…"

He saw one of the main issues for such corrective action as "bridging the gap between law and society".[11]

21. It is a depressing fact that, 40 years after the enactment of 1965 Act, fundamental issues as to its practical implications and substantive effect, at least in relation to village greens, remain unresolved. This is in spite of numerous judicial decisions at all levels, including two recent House of Lords cases, and in spite of amending legislation in 2000. It is not surprising if, in consequence, there is a gulf between the law and society's perception. "System-wide corrective action" is urgently required.

22. The main problem, as was pointed out in this court as long ago as 1975,[12] is that, while class *a* and *b* greens were well-established legal concepts, class *c* greens were a new creation of the 1965 Act, for which no legal incidents were prescribed. At that time it was suggested by Lord Denning that, if amending legislation were too long delayed, judicial interpretation might have to fill the gap. Over the years since then, the difficulties have frequently been acknowledged in judgments, government reports, and other authoritative studies. Legislative action has been promised.[13] In 1995 I referred to some of these sources.[14] A decade later the problem remains. Most recently, in *Beresford*, Lord Walker, while agreeing with the registration of the open space in that case as a "town or village green", added:

> "…the campaigners have achieved that end by a route which has by-passed normal development controls, and in a way which may be thought to stretch the concept of a town or village green close to, or even beyond, the limits which Parliament is likely to have intended…"[15]

23. To bring matters up to date, we have been shown a note prepared for the present hearing, following a conversation with the Senior Policy Officer for Commons Legislation at DEFRA.[16] This indicates that a Commons Bill is currently under preparation, relating mainly to improvements to the management of common land. A decision had been taken not to include any significant provisions in relation to town and village greens "because it was felt that the subject was too complex to be included in the Bill." It is, however, intended that there should be research with regard to the continuing registration of greens, with a view to updating existing data, investigating conflicts and problems, and also exploring "whether village registrations are being used to frustrate development". There is no timetable either for completion of this work, or for further legislation. For the foreseeable future, therefore, we must take the statute as it is.

24. Against this background, I am reluctant to accept that there is nothing the courts can do. We can and should look again at the 1965 Act in its historical context. We should be guided by the assumption, so far as possible within ordinary judicial constraints, that the Act was intended to achieve its stated purpose of providing a definitive register of common land and town and greens, and to have practical effects, within a scheme which was coherent, workable and fair. We are entitled also to have regard to the Royal Commission report, whose recommendations provided the basis for the legislative scheme.[17] At the same time, in accordance with established principles, we must adopt a restrictive approach to the interpretation of legislation which imposes or extends penal obligations or detrimentally affects property rights.[18] Finally, section 3 of Human Rights Act 1998 requires us, so far as possible, to interpret all legislation (old and new) in a manner compatible with the rights guaranteed by the European Convention of Human Rights, including the protection of property rights.[19]

25. Counsel appearing before us, all of whom are experienced in this field, joined in urging us to be as bold as we feel able, in providing practical help for those interested as land-owners or claimants, and for the authorities who have to administer the system on a day-to-day basis. In doing so, right or wrong, we may at least help to clear the way for further corrective action by the House of Lords in its judicial capacity, or by Parliament.

Greens – ancient and modern

26. It is impossible to reach a principled conclusion on the fundamental questions raised by the first two issues, without revisiting the development of the law in this area from its beginnings in the 17th Century to the Royal Commission report and the 1965 reforms.

27. Aspects of the relevant history were reviewed in the "magisterial"[20] speech of Lord Hoffmann in *Sunningwell*, and in *Beresford* itself. However, in neither case did the House find it necessary to resolve the uncertainty as to the substantive effect of registration under class *c*. In *Sunningwell* Lord Hoffmann referred to this uncertainty when commenting on the background to the case. He said:

> "It is unclear what rights, if any, registration would confer upon the villagers. The Act is silent on the point. But registration would prevent the proposed development because by section 29 of the Commons Act 1876 encroachment on or inclosure of a town or village green is deemed to be a public nuisance."[21]

The extent of the villagers' rights was not in issue in that case. Nor (notwithstanding Lord Hoffmann's reference to it) was the application of section 29 of the 1876 Act. We understand (from Mr Laurence QC, who also appeared in that case) that there was no argument on the point, and it remains properly as an issue before us (issue (ii)).

28. In the *New Windsor* case, Lord Denning in a characteristically vivid passage encapsulated the essentials of the law of customary rights over village greens.[22] However, to answer the issues left open in that case, and in *Sunningwell*, it is necessary to fill in some more of the detail. In this review, I will seek to emphasise four main points:

i) Understanding of the law at the time of the Royal Commission's report depended principally on its development and clarification in cases and writings in the second part of the 19th Century, in spite of which many points remained unresolved;

ii) There was no standard package of rights applicable to all town or village greens. Rights depended on customary law. The extent of the local rights in any case, and the identity of those entitled to enjoy them, depended on the local evidence.

iii) Although some 19th Century statutes contained references to "town or village greens", the statutory term was not defined. There was nothing in the statutes or in any reported cases which necessarily limited that term to land subject to customary rights.

iv) Historic class *c* greens, as a concept, were a natural extension of the common law, and consistent with the objectives of the 1965 Act. Modern class *c* greens are neither; and it seems likely that they were an unintended consequence of the statutory definition. Although they are now firmly embedded in the law, there is no policy reason to give them a substantive significance beyond that expressly or impliedly required by the statutory wording.

29. In this part of the judgment, I will review the development of the law in five parts:

i) 19th Century cases and studies

ii) 19th Century statutes

iii) The Royal Commission and the 1965 Act

iv) Modern class *c* greens

v) Sunningwell

19th Century cases and studies

30. Compared to the venerability of village greens as an institution, the legal sources before the 19th Century are surprisingly thin. In so far as it is possible to refer to an established body of law before the 1965 Act, it is largely derived from cases and treatises in the second half of the 19th Century. This period coincided with increasing concerns over the social consequences of the inclosure of commons, and recognition of the needs of the growing urban populations for exercise and recreation. Immediately before this period came the Inclosure Act 1845, which:

> "… carried much farther the concept that inclosure was the concern of all the local inhabitants, and not only of the lord and the commoners"

and which first included a general prohibition on the inclosure of town or village greens.[23] Other legislation followed during the 19th Century, to some of which I shall refer in the next section. However, there was no statutory definition of the expression

"town or village green", and apparently no reported case in which its statutory meaning was discussed.

31. The 19th Century authors sought legal underpinning for the traditional rights over village greens in the law of customary rights. That law is usefully summarised in the current edition of Megarry & Wade:

> "Such rights differ from easements in that they are exercisable by all who are included within the custom, independently of ownership of a dominant tenement and independently of any grant. They differ from public rights in that they are exercisable only by members of some local community, not by members of the public generally. The user must be as of right and, as such, linked to a particular locality. For these purposes, the locality must, it seems, be some unit recognised in law, such as a parish or town.
>
> "A custom really amounts to a special local law, a local variation of the common law. The common law recognises such variations only if they are ancient, certain, reasonable and continuous. To be 'ancient' a custom must date back to the year 1189, the beginning of legal memory; but ancient origin may be presumed if there has been long enjoyment and there is no proof of a later origin…."[24]

By the end of the 19th Century it seems to have become settled law that:

> "A regular usage of twenty years unexplained and uncontradicted is sufficient to warrant a jury in finding the existence of an immemorial custom … And from such modern usage, unless the contrary appear, the jury ought to presume the immemorial existence of the right…"[25]

32. The 19th Century textbooks refer to two old cases as directly relevant to village greens: *Abbot v Weekly* (1666)[26], and *Fitch v Rawling* (1795)[27]. In neither does the report contain any mention of a "village green" as such. Both were unsuccessful actions for trespass by the owner of land, where the defence rested on an alleged custom. In *Abbot v Weekly* the court upheld a customary right for the inhabitants of a village to use the land "to dance there at all times of the year at their free will and for their recreation". In *Fitch v Rawling* the defendants had played cricket on the plaintiff's land, relying on an alleged custom for the inhabitants of the parish, to use the land for "all kinds of lawful games, sports and pastimes…at all seasonable times of the year…" The reported arguments revolved round a number of technical and pleading points, such as whether cricket was within the custom, and whether it mattered that some of the players (presumably the opposing side) came from a different parish.

33. Writing in 1868 Charles Elton[28] said of these cases:

> "On these cases rest the immemorial privileges enjoyed by inhabitants upon town-greens and village-greens, which may be defined as small portions of wastes dedicated to the inhabitants of a certain place, either by custom or by express grant of an owner in fee-simple."[29]

He contrasted these local rights with the position of the general public, which "has no such rights by the common law, and cannot claim them by particular custom". This was illustrated by reference to two recent cases,[30] where a customary claim by village inhabitants to use of land as a village green was rejected because the evidence showed that "the general public resorted to the place for recreation and roaming about". A similar objection in 1876 proved fatal to a claim to customary rights on Stockwell Green in Lambeth, in the well-known case of *Hammerton v. Honey*.[31] Sir George Jessel MR said:

> "…what must be the usage proved? It must be not only consistent with the custom alleged, but…not too wide. For instance, if you allege a custom for certain persons to dance on a green, and you prove in support of that allegation, not only that some people danced, but that everybody else in the world who chose danced and played cricket, you have got beyond your custom."

In *Edwards v Jenkins*[32] it was even held to be fatal that the claimed rights were enjoyed by three parishes, rather than one. Although Lord Denning doubted the correctness of this decision,[33] it remains a fundamental feature of a customary right that it is for the benefit of a particular locality, not for the world at large.

34. In 1896, Sir Robert Hunter devoted a whole chapter of his work on Open Spaces to the subject of village greens.[34] This is particularly valuable as an authoritative review of the state of the law towards the end of the main period of case-law development. Even then, he noted the continuing uncertainty of the law:

> "So familiar is the expression 'village green' that it has found its way into Acts of Parliament, and even into the utterances of the Courts. Yet the term 'village green', like the term 'common' as applied to a piece of land, has no exact legal definition, unless it be that of green situate in a village. It does not follow, that, because a piece of land is what is usually called a village green, it is therefore subject to peculiar rights. It may be subject to such rights, but in each case the existence of the right, as a fact, has to be proved."[35]

35. Hunter referred to the difficulties of proving customary rights under the case-law, particularly given the practical impossibility of showing "systematic exclusion of the general public", and the consequent need to show:

> "…some kind of assertion of right on the part of the inhabitants over and above the mere use in common with others…"[36]

36. One topical issue was whether the right of recreation "may be claimed at all times of the year, or only at seasonable times", the latter words being taken from the description of the custom upheld in *Fitch v Rawling*. Hunter commented:

> "…it seems now to be settled that the right may be claimed at all times. Nevertheless, the custom must be used reasonably, and no wanton damage caused…"[37]

The authorities relied on as resolving this dispute were *Mounsey v Ismay*[38], and *Hall v Nottingham*.[39] The first was not about a village green in the ordinary sense, since it concerned an alleged custom to use the plaintiff's land for horse-racing on only one day each year (Ascension Day). The second concerned land known as the "Maypole Piece", in a Shropshire village. The alleged custom was for the villagers to erect a maypole and dance around it, and "otherwise (to) enjoy any lawful and innocent recreation at any times in the year on the land". This was upheld even though not expressly limited to "seasonable times". The court followed *Abbot v Weekly* and *Fitch v Rawling*, which:

> "… taken together show that all lawful games and pastimes may be used at all times."[40]

The court rejected an objection that the custom was too uncertain. Cleasby B said:

> "Looking to the nature and origin of such customs, it would be unreasonable to expect any precise certainty as to what should be enjoyed as a matter of right."[41]

37. Two other cases, referred to by Hunter,[42] show that by this time claims to customary recreational rights were not confined to small areas within villages or towns. In *Virgo v Harford*[43] the court upheld recreational rights of the villagers over 65 acres of "fine open land on the top of a hill". The rights, as so declared, extended to "the playing of football, rounders, cricket, and all other lawful village sports, games and pastimes". In *Lancashire v Hunt*[44] the claim related to an area of some 160 acres, known as Stockbridge Common Down. The main issue was the extent to which commercial training of horses was permitted. It was held that the inhabitants were entitled by custom to use the Downs:

> "…for all useful and lawful games and recreation, including riding…and to erect such tents and other accessories as were necessary…"

but not so as to include the training of horses not belonging to the inhabitants, or the business of training of horses for profit.

19th Century Statutes

38. I turn to the 19th Century statutes, which are relevant both to the background of the 1965 Act, and to one of the main issues in this case (issue (ii)). Town and village greens were referred to in a number of statutes, without definition.

39. Thus, section 15 of the Inclosure Act 1845 provided that "no town green or village green shall be subject to be inclosed", and it also provided powers for such greens to be allotted to the "churchwardens and overseers of the poor…" in trust for use for "exercise and recreation". Section 147 provided a procedure whereby "land not subject to be inclosed" (which under section 15 would have included village greens) could be exchanged for other land, on terms approved by the inclosure commissioners. There was separate provision in section 73 of the Inclosure Act 1845 for the allotment of land "as a place of exercise and recreation for the inhabitants of the said parish and neighbourhood", but no indication that such land was to be equated with a "town or village green" in the statutory sense.

40. Later statutes made further provision for the protection of village greens and allotted recreation land, by deeming certain encroachments or interferences to be "public nuisances", and so subject to criminal prosecution. They were section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876. The language is somewhat dense, but the detail is immaterial. In summary, the 1857 Act created various summary offences for the purpose of preventing nuisances:

> "in town greens and village greens, and on land allotted and awarded upon any inclosure under the (Inclosure) Acts as a place for exercise and recreation…"

The acts so prohibited included:

> "any act whatsoever…to the interruption of the use or enjoyment thereof as a place for exercise or recreation."

The l876 Act provided that any encroachment, erection or interference made on a "town or village green", otherwise than with a view to its "better enjoyment", should be "deemed to be a public nuisance" so as to give rise to a summary offence under the 1857 Act.

41. In some statutes, town or village greens were included in the definition of "commons". An example is the Commons Act 1899, which gave district councils various powers (including management schemes and bye-laws) in respect of "commons". Commons were defined so as to:

> "include any land subject to be inclosed under the Inclosure Acts 1845 to 1882, and any town or village green."

The same definition was carried into the compulsory purchase legislation, which provided for a "common" (including a town or village green) to be compulsorily acquired, subject to the provision of other land "equally advantageous…to the public", and subject to the "same rights, trusts and incidents".[45]

42. We have been shown no reported case which considered the expression "town or village green" in any of these statutes, or, in particular, which directly linked it to the cases on customary rights. It is noteworthy that in 1896 Hunter made no such link. Thus, of the references to "town or village greens" in the Inclosure Acts, he said:

> "For the purpose of these enactments, a village green or town green means, it may be assumed, a green situate in a village or town and habitually used as the green of the place for recreation, air, and exercise; it would not be necessary to prove that a legal right of recreation in the inhabitants of the district ever existed."[46]

He cited no authority for this proposition, but it may have represented a realistic view of the practicalities of summary proceedings at the time when these statutes were enacted. In any event, in considering the purposes of the 1965 Act, it cannot be taken as settled law that "town or village greens" in the 19th Century statutes were limited to those over which customary rights could be strictly proved.

The Royal Commission and the 1965 reforms

43. There appear to have been no significant cases (or academic writings) about village greens between the first world war and the setting up in 1955 of the Royal Commission on Common Land, which led in due course to the 1965 Act. In *Sunningwell*, Lord Hoffmann summarized the background and general effect of the reforms, so far as related to village greens:

> "The main purpose of the Act of 1965 was to preserve and improve common land and town and village greens. It gave effect to the Report of the Royal Commission on Common Land…, which emphasised the public importance of such open spaces. Some commons and greens were in danger of being encroached upon by developers because of legal and factual uncertainties about their status. Others were well established as commons or greens but there was uncertainty about who owned the soil. This made it difficult for the local people to make improvements (for example, by building a cricket pavilion). There was no one from whom they could obtain the necessary consent.
>
> The Act of 1965 dealt with these problems by creating local registers of common land and town and village greens which recorded the rights, if any, of the commoners and the names of the owners of the land. If no one claimed ownership of a town or village green, it could be vested in the local authority. Regulations made under the Act prescribed time limits for registrations and objections and the determination of disputes by Commons Commissioners. In principle, the policy of the Act was to have a once-and-for-all nationwide inquiry into commons, common rights and town and village greens. When the process had been completed, the register was conclusive. By section 2(2), no land capable of being registered under the Act was to be deemed to be common land or a town or village green unless so registered."[47]

44. I would only comment, with respect, that the first paragraph perhaps understates the extraordinary complexity of the task which faced the Commissioners, against a background of widely differing geographical settings and local traditions, and very uncertain legal principles.[48] One cannot read the report without huge admiration for their achievement in bringing order to this apparent chaos.

45. In their vivid general description, the Commission contrasted the traditional image of the village green with:

> "…the reality (which) all too frequently falls far short of imagination… Too often…village greens are neglected and become rank with unmown grass and weeds, or trodden bare, used as dumps for rubbish and disfigured with litter. So far from being untouched, they may find the hand of the twentieth century lying heavy upon them…"[49]

Most of the report was concerned with common land as such, for which detailed proposals were made for registration, public access and management.

46. Town and village greens were dealt with relatively briefly, both in the body of the report and the legal commentary by Sir Ivor Jennings QC himself. The glossary defined such a green as:

> "A piece of open land in a village on which the inhabitants of the village (or town) have a customary right of playing lawful games and enjoying it for recreation."[50]

The Commission recommended the extension of their proposals for registration (but not apparently those for access and management) to village greens, commenting:

> "There are probably very few villagers who will not know what they mean by their 'green'; equally their assumption that it is 'their' green is seldom likely to be questioned."

However, to guard against the "difficulty and expense" for inhabitants if put to proof of their green, they recommended that the relevant local authority should be able to claim the land as a town or village green, and that, subject to an successful objection to the Commons Commissioner within a defined time, title would be deemed to be vested in the authority, which should maintain it as open space.[51] Village greens were to be excluded from the definition of common land.

47. The definition of "town or village green" proposed for this purpose was wider than that in the glossary, and anticipated the three parts of section 22:

> "Any place which has been allotted for the exercise or recreation of the inhabitants of a parish or defined locality under the terms of any local Act or inclosure award, any place in which such inhabitants have a customary right to indulge in lawful sports and pastimes, *and in a rural parish any unenclosed open space which is wholly or mainly surrounded*

> *by houses or their curtilages and which has been continuously and openly used by the inhabitants for all or any such purposes during a period of at least twenty years without protest or permission from the owner of the fee simple or the lord of the manor*." (emphasis added)[52]

There is a tantalizing lack of any discussion of the third category. It may not be coincidental that it reads like an elaboration of the wording suggested by Hunter in connection with the 19th Century statutes:

> "…a green situate in a village or town and habitually used as the green of the place for recreation, air, and exercise…"

The Commission may have had in mind that, as already noted, the statutory meaning of a "town or village green" was not settled law. They may have wished to cast their net wide enough to ensure that no plausible candidate escaped consideration at the initial stage of the registration process.

48. As has been seen, the 1965 Act definition followed the three-part format, in classes *a* to *c*; but the third was significantly widened by removing the limitation to land surrounded by houses. Again one can only speculate as to the reasons for this extension. It is possible that this was the draftsman's response to the analogy of cases such as *Lancashire v Hunt*, to which such a restrictive definition would have been inapplicable.

49. More generally, the draftsman's objective, in creating the concept of historic class *c* greens, may have been to cut through some of the technicalities of customary law. He would have had in mind that, where a land-owner had a valid defence to such local claims to recreational rights over his land, the time between the passing of the Act and the final registration of claims would leave him plenty of opportunity to assert it. This might be by express licence or by effective prohibition, either of which would have the effect that it would no longer be "as of right".[53] Thus any land in relation to which a claim to village green status survived the registration process, could, without unfairness, be regarded as the practical equivalent of a customary green.[54]

50. In practice, in their handling of the initial registrations, Commissioners understandably seem to have treated classes *b* and *c* as overlapping, without always drawing a clear distinction between the two.[55] As already noted, the Act itself required only that the land should be registered as a town or village green, without specifying the class which brought it within the definition.

Modern Class C Greens

51. The concept of a "modern" class *c* green, as it has emerged in the cases since 1990, would, I think, have come as a surprise to the Royal Commissioners, and to the draftsman of the 1965 Act. There is no hint of it in the Royal Commission report, or the Parliamentary Debates on the Bill. The Commissioners' terms of reference were directed to sorting out the problems of the past, not to creating new categories of open land, for which there was no obvious need. By this time, of course, there were

numerous statutes conferring on public authorities modern powers for the creation and management of recreational spaces for the public.

52. It is true that section 13 contemplated the possibility of new entries, by including power to amend the register, where land "becomes…a town or village green". However, that provision could be readily explained by the long-established statutory provisions for the substitution of replacement greens under the Inclosure Acts or compulsory purchase law. There was no need to infer an intention to create a new category of modern greens, established merely by use. Furthermore, the fact that the procedure was entrusted to administrative authorities (subject to correction by the court), rather than Commons Commissioners, implies an assumption that the issues would be relatively clearcut. Had anyone anticipated the kinds of factual and legal disputes exemplified by the present case, one would have expected the specialist role of the Commons Commissioners to be extended to deal with them.[56] It is notable that, as late as 1975, in the *New Windsor* case, all three members of the court thought it natural to read class *c* as referring to 20 years "before the passing of the Act"[57] – an interpretation which would have excluded the possibility of modern class *c* greens.

53. The first suggestion of a wider purpose seems to have come in the notes to the 1969 "new land" regulations, already referred to. They indicated that land could "become" a town or village green after January 1970 in four ways.[58] Category (iii) was:

> "By the actual use of the land by the local inhabitants for lawful sports and pastimes as of right for not less than 20 years."

This suggestion appears to have been derived simply from the statutory definition; no further explanation was given.

54. Of the other categories, (i) and (iv) were unsurprising: (i) creation by or under and Act of Parliament, and (iv) substitution or exchange for existing greens under statutes so providing.[59] Category (iii) ("by customary right established by judicial decision") can now be seen to have been a mistake. If, as already discussed, any unregistered customary rights were extinguished by section 1(2), a subsequent judicial decision could not revive them.

55. The questions raised by modern class *c* greens did not come before the higher courts until 1995.[60] In the two cases considered in that year,[61] no point was taken as to the principle; but the restrictive interpretation adopted in those cases, if upheld, would have severely limited the potential for successful registrations. That changed with the decision of the House of Lords in *Sunningwell* (1999), since when this has become an area of unusually vigorous legal activity for registration authorities, and for the specialist bar – whether in the conventional role of counsel, or as inspectors in non-statutory inquiries established by registration authorities.

56. In *Sunningwell*, not only was the principle of the modern class *c* green accepted by the House of Lords without question, but it was taken as one of the reasons for the statutory provision for amendment.[62] Since then, the amendment made in 2000 to the statutory definition of class *c* can be seen as implicit endorsement of the principle by Parliament. Accordingly, even if (as I believe) it was not what was intended in 1965,

the clock cannot be turned back. However, this history may be relevant when one is trying to make sense of the statutory scheme as we now have it.

Sunningwell

57. The principal issue in *Sunningwell* was whether the words "as of right" (in class *c*) required, as the Court of Appeal had held:

> "…an honest belief in a legal right to use…as an inhabitant… and not merely a member of the public".[63]

That view was rejected by the House of Lords, holding that, as in statutory provisions for public rights of way, the words "as of right" were in effect shorthand for the common law expression *"nec vi nec clam nec precario"* (not by force, nor stealth, nor the licence of the owner)".[64] What mattered was the appearance conveyed by the use of the land to its owner, not the subjective beliefs of the users:

> "The user by the public must have been, as Parke B. said in relation to private rights of way in *Bright v. Walker* (1834) 1 Cr. M. & R. 211, 219, "openly and in the manner that a person rightfully entitled would have used it. . ."[65]

In other words, they must have used the land –

> "…in a way which would suggest to a reasonable landowner that they believed they were exercising a public right."[66]

58. Lord Hoffmann had previously commented on the division into three classes. Class *c* was explained by Lord Hoffmann by reference to a detailed comparison of English and Scottish law relating to the acquisition by prescription of private and public rights of way, including the Prescription Act 1832 and the Rights of Way Act 1932. The latter provided for a presumption of dedication as a highway after 20 years enjoyment "as of right", which he saw as "an echo" of the words "claiming right" under the 1932 Act, and intended to have the same effect. Of the 1965 Act he said:

> "…this was the background to the definition of a 'town or village green' in section 22(1) of the Act of 1965. At that time, there had been no legislation for customary rights equivalent to the Act of 1832 for easements or the Act of 1932 for public rights of way. Proof of a custom to use a green for lawful sports and pastimes still required an inference of fact that such a custom had existed in 1189. Judges and juries were generous in making the required inference on the basis of evidence of long user. If there was upwards of 20 years' user, it would be presumed in the absence of evidence to show that it commenced after 1189. But the claim could still be defeated by showing that the custom could not have existed in 1189…
>
> It seems to me clear that class *c* in the definition of a village green must have been based upon the earlier Acts and intended

> to exclude this kind of defence. The only difference was that it allowed for no rebuttal or exceptions. If the inhabitants of the locality had indulged in lawful sports and pastimes as of right for not less than 20 years, the land was a town or village green…"[67]

59. The particular issue whether a custom could have existed in 1189 does not in fact seem to have figured in any of the reported cases on customary recreational rights.[68] However, this passage is consistent with the view that the general objective of the draftsman of the 1965 Act was to enable the Commissioners to cut through such technicalities, recognising the difficulties of proof for local claimants in cases (of which there must have been many) where:

> "None of them knew the origin of the right but that they had it there was no doubt in any of their minds."[69]

60. For present purposes, however, the main significance of *Sunningwell*, in my view, is in its implied widening of the division between class *c* and the traditional customary green, represented by class *b,* a process which was continued by the 2000 amendment.

61. In the first place, in relation to modern class *c* greens, there is no place for any "claim of right" in the traditional sense,[70] to provide the link between the recreational use and the inhabitants of a particular locality. In *Steed* in 1995, I had seen such a link as essential in this context in order to define the right, by contrast with the context of rights of way:[71]

> "…Regular and open use of a particular route by the public, or of a particular access by the occupier of a tenement, can readily be taken as an assertion of right; the right is defined by the use, and in each case it is a right recognised by the law.[72] Recreational use of a particular piece of land by members of the public is not so readily interpreted, since a prescriptive right to roam as such is unknown to the law…Thus, the Act requires something more than mere usage to define the right; the usage must be linked to a right claimed by the inhabitants of a particular locality."[73]

That approach cannot stand with *Sunningwell*, in which Lord Hoffmann, in rejecting the subjective test, relied almost exclusively on analogies with the law of prescription in the context of rights of way, public and private.[74] Indeed, a credible "claim of right" is impossible for a modern class *c* green, since, even on pieces of land where there was once the possibility of such a claim, it was extinguished in 1970 by the effect of section 1(2), if the land was unregistered. A genuine claim of right is no part of the concept of a modern class *c* green.

62. Other parts of Lord Hoffmann's speech in *Sunningwell* provide further illustrations of the differences between historic and modern class *c* greens. Various points had been made on the interpretation of the expression "lawful sports and pastimes" in class *c*, including analogies with customary rights. These were rejected. Lord Hoffmann treated the expression as "a single composite class", so that:

> "As long as the activity can properly be called a sport or a pastime, it falls within the composite class."[75]

Furthermore the expression must be interpreted by reference to current practice:

> "Class *c* is *concerned with the creation of town and village greens after 1965* and in my opinion sports and pastimes includes those activities which would be so regarded in our own day…"[76] (emphasis added)

Having noted that in modern life "dog walking and playing with children" might be the main function of a village green, he added:

> "It may be, of course, that the user is so trivial and sporadic as not to carry the outward appearance of user as of right."[77]

63. Similarly, he rejected an argument, based on the 19th Century case-law, that the evidence of user was too broad, because it included people who were not inhabitants of the locality. He said:

> "That was with reference to a claim to a customary right of recreation and amusement, that is to say, a class *b* green. Class *c* requires merely proof of user by 'the inhabitants of any locality.' It does not say user *only* by the inhabitants of the locality, but I am willing to assume, without deciding, that the user should be similar to that which would have established a custom."[78]

On the evidence it appeared that informal recreation on the glebe "was predominantly, although not exclusively, by inhabitants of the village" Lord Hoffmann commented:

> "I think it is sufficient that the land is used predominantly by inhabitants of the village."[79]

64. Taking these passages together, therefore, it appears that Lord Hoffmann was treating class *c* as a free-standing category, "concerned with the creation of town and village greens after 1965", and to be interpreted in a modern context, unhampered by technicalities of customary law applicable to class *b*. The test is objective. Provided that the recreational use is sufficiently substantial "to carry the outward appearance of user as of right", and provided that the predominant use is in fact by inhabitants of the locality, that is sufficient, regardless of the impossibility of any credible claim of right.

65. This general approach can be seen as having received endorsement by Parliament in the 2000 Act, which introduced the new[80] concept of a "*neighbourhood* within a locality", and required no more than a "significant" number of local users. Whatever precisely that expression means (which happily is one of the few issues not before us),[81] it can only have the effect of weakening still further the links with the traditional tests of customary law.

Issues in the present case

66. Against that background, I turn to the particular issues in the present case, grouped under the main headings identified above.

(a) Substantive effect of class c registration

Introduction

67. Issues (i) and (ii) raise fundamental questions as to the legal effect of registration as a class *c* green. They treat separately two aspects: (i) what rights (if any) are enjoyed by "the relevant inhabitants"; and (ii) what criminal sanctions are applicable to such greens under the 19th Century statutes relating to town or village greens.

68. It is important to emphasise at the outset that we are concerned solely with rights or liabilities created by the Act itself, as opposed to any arising under other legislation or the general law. Rights over greens were not registrable as such. In relation to historic class *c* greens, registration under the Act did not purport to alter the character of any previously existing rights, customary or otherwise, or those entitled to them. The difference, in relation to modern class *c* greens, is that, even if there were any customary rights, they were destroyed by the Act. Accordingly, the nature of any rights or liabilities has to be found in some provision of the Act itself.

69. The definition section itself has no substantive effect. It merely states the criteria for registration. Accordingly, arguments about the meaning of the words "becomes a green" (in section 13) are beside the point. That is simply an indication that the land has acquired the status of a "village green", as defined by the Act, so as to become registrable as such.[82] It says nothing about the legal consequences of registration. The answer to that question, as Lightman J said, has to be found in section 10, which states the effect of registration; it is

> "… conclusive evidence of the matters registered as at the date of registration."

70. The difficulty comes in the interpretation of the section. It is easy to state the problem:

i) Under ordinary principles the creation of new rights over private land or the imposition of new criminal liabilities requires a clear expression in the statute. The 1965 Act is on its face (with some limited exceptions) concerned with registration, not with the creation of rights or liabilities; there are no clear words, in section 10 or elsewhere, having such effect.

ii) On the other hand, section 10 was presumably intended to achieve something. Since the status of a class *c* green had no recognised legal consequences outside the Act, if the fact of class *c* status is the only "matter" on which the register is conclusive, then the Act has achieved nothing in that respect.

iii) The problem goes further. Although the status of a class *a* or *b* green is recognised by the general law, the register does not distinguish between the different classes. Accordingly, whether a particular registered green is within class *a* or *b* on the one hand, or class *c* on the other, is not a "matter" which

> one can deduce from the register. Thus it is not possible to tell from the register whether *any* of the greens included in it are subject to any legally enforceable rights or constraints.

71. Lightman J took a robust approach to these issues:

> "The starting point is section 10 of the 1965 Act. Registration is conclusive evidence of the facts registered, and accordingly, in case of a registered class c Green, that the land is in law and fact a Green. The critical question, as it seems to me, is accordingly what is the effect of the land in question being (as registration conclusively proves it to be) a Green. The answer is that, unless the legislation manifests an intention that the existence and character of any incident rights is to await determination by subsequent legislation or that the incident rights of a class c Green are to be different from the established incident rights of a class a or b Green, *the same rights must attach to class c Greens (whether registered or not) as attach to class a and b Greens, namely the rights of the local inhabitants to indulge in lawful sports and pastimes on the land.* In my judgment the 1965 Act manifests neither such intention."[83] (emphasis added)

72. His reference to "determination by subsequent legislation" is to Lord Denning MR's suggestion that the apparent deficiencies in the 1965 Act were explicable by the fact that further legislation was anticipated to deal with issues of use and management.[84] Lightman J had already concluded, from his examination of the Act and the Parliamentary background, that references to such further legislation related to common land, but not village greens.[85] If that is right (and I accept that it is a possible interpretation of the contemporary Parliamentary statements), it is less surprising if the only class *c* greens in anyone's mind at the time were historic greens.

73. Of the cases referred to by Lightman J, the most explicit support came from the judgments of this court in *Steed*. Pill LJ said:

> "While I accept that, by its title, the Act is said to be 'an Act to provide for the registration … of town or village greens' and not an Act to amend the law relating to public rights, section 22 does provide that 'in this Act unless the context otherwise requires', class C land is included within the definition 'town or village green'. There is no express limitation upon the purposes for which the land is included within the definition. There is no doubt that the inhabitants have rights over class A and class B greens and the effect of land being a class C green should be considered in that context. I find it difficult to conclude other than that Parliament intended, in section 22, to open the way to the creation of new rights. The right is 'to indulge in lawful sports and pastimes' while avoiding the need

> to prove an immemorial custom or legal origin which would establish a class A or class B green….
>
> The analogy is not exact but I see class C as a way of establishing rights just as section 1(1) of the Rights of Way Act 1932 (now section 31 of the Highways Act 1980) provided a means of proving the existence of a highway…. An actual dedication need not be proved. I would construe the class C definition as having the same effect in making proof of the appropriate user sufficient to create a right…."[86]

74. Lightman J concluded on this aspect:

> "… registration merely records and confirms the prior existence of the class c Green. Registration is simply of a Green. Plainly the incidents of a class a and a class b Green include the rights of local inhabitants to use the Green: there is no suggestion in the legislation that the same incidents do not attach to a class c Green and one would naturally expect that the incidents should reflect the qualifying user. I conclude that the existence of a Green of whichever class, whether established with or without the benefit of the presumption arising by reason of registration, gives rise to the rights of the local inhabitants ordinarily incident to the status of such a Green."[87]

Issue (i) - rights

75. With respect to both Lightman J and Pill LJ, I find it impossible to accept their approach, at least in relation to the existence of rights. Not only does it ignore the general statutory presumption against interference with property rights without clear words. More importantly, in my view, it misrepresents the nature of customary rights. It assumes the existence of a single package of rights, "ordinarily incident to the status of a (Village) Green", which attaches to all class *a* and *b* greens, and can therefore be applied by implication to class *c*. As the historical review has shown, that is not a correct representation of the customary law of village greens.

76. It may be that, in modern conditions and for most practical purposes, the uses of most class *a* and *b* greens are the same. The public uses them for recreation, and no-one pays much attention to the historical source of the rights, or even the "locality" to which they are attached. However, in law class *a* and *b* greens are distinct, and have different legal attributes. More importantly, within class *b* itself, the extent and nature of any rights, and those entitled to enjoy them, are defined by the custom under which they arise,[88] even if in the later cases a more flexible approach was sometimes adopted. To take but one example, on a "green" as extensive as Stockbridge Common a customary right to exercise horses for non-commercial purposes would cause little problem, at least as long the right is confined to those living in a defined locality; but on the typical small village green a custom to that effect could be highly controversial.

77. For village greens, as opposed to common land, the 1965 Act did not require the registration of rights. That may well be because, unlike common rights which may have considerable commercial value, the historical differences between greens were thought to be of little practical significance. Where disputes arose, they were probably best left to be sorted out locally. However, that does not mean that the distinctions had lost their legal significance.

78. The difficulties of implying such general rights are compounded by widening of the gap between class *b* and *c*, to which I referred when discussing *Sunningwell* and the 2000 Act. It is one thing to say that informal recreation may represent a "sport or pastime" sufficient to procure registration. It is quite another to say that it brings with it a general right for the public at large to use the land for *any* sports or pastimes, however intrusive or mutually incompatible they may be. Parliament cannot be taken as intending to create a free-for-all (walkers, riders, cricketers, footballers, golfers, and so on) without any provision for its regulation.

79. Similarly, as has been seen, it is an essential feature (at least in legal theory) of class *b* greens, that any rights arise by virtue of a connection with a particular locality, which has a historic claim to them. For modern class *c* greens any such historic link has been severed. Under *Sunningwell* and the 2000 Act, the "locality" test can now be satisfied simply by pointing to a "neighbourhood" from which a "significant" number of users come. That is understandable, if the purpose is simply registration. But if the purpose is to confer rights, one needs to know to whom they are to belong: to the "significant" number, to the neighbourhood, to the locality, or to the whole world? The 2000 Act itself provides no answer; and the gulf between class *c* and class *b* has now become too wide to enable any answer to be found by analogy with customary law.

80. In my view, it is impossible, by the application of any accepted judicial technique, to hold that registration of a class *c* green, in itself, implies any formal legal right to its use, whether by the public in general or by any particular group. This conclusion should not materially affect the use of historic greens. The fact that they were registered in the initial period will be apparent from the register, and will be one of the "matters" which section 10 makes conclusive. In those cases 20 years unchallenged use for recreation by local inhabitants before 1970 can reasonably be equated with a customary use. There is likely to be no reason why recreation should not have continued after 1970 in the same way as it had in the past. The problem in relation to modern 20 year greens is that, even if they did enjoy customary rights in the past, those rights have been extinguished by section 1(2). By revealing the date of the entry, the register reveals on its face that there *cannot* any longer be any historic rights; and there is nothing in the Act to create them.

81. Issue (i) therefore must be answered in the negative.

Issue (ii) - penal restrictions

82. If registration says nothing about the existence of any rights over the land, can it nonetheless operate so as to bring registered land within the scope of the 19th Century statutes applicable to town or village greens? My initial reaction was: obviously not. How can a definition enacted in 1965, and expressly stated to be defining terms "in

this Act", be held by implication to operate retrospectively to alter the meaning of a penal statute passed a century before?

83. That, as we have seen, was not the instinctive reaction of Lord Hoffmann. He acknowledged the uncertainties over rights, but assumed without argument that the 19th Century Acts would be engaged. This was the most recent authoritative statement on the issue when Parliament legislated in 2000. The same assumption was made by this court, with the support of counsel for DEFRA, in *Whitmey*.[89] Those indications, though not binding on us, call for careful consideration.

84. On further consideration, I am persuaded that this approach can be defended on accepted principles of construction. The definition in section 22 applies "unless the context otherwise requires". Arguably, the context of section 10 does so require, in order to avoid circularity, and to give it some substantive effect. The "matter" stated in the register, and which is conclusively established, is that the registered land is a "town or village green". If one can look beyond the definition of a town or village green in section 22, then there is nothing to prevent its application to the same expression as used in other statutory contexts. As has been seen, town and village greens were referred to in the 19th Century statutes without definition, and there was no settled legal interpretation of that term. It would certainly have been consistent with the purposes of the 1965 Act to clarify the application of those references by providing a conclusive means of identifying the land to which they applied.

85. In supporting this view, Mr Laurence referred (as he did before Lightman J) to the principle of statutory interpretation, known as "updating construction"; that is, that the meaning of the statutory words is treated as continuously updated to allow for changes since it was initially framed.[90] I did not find this helpful in the present context, since none of the cases initially cited by him related to changes brought about by legislation (as opposed to outside circumstances). In such cases, if Parliament intends an "updating" effect, one would expect it to be apparent from the legislation.

86. Further research disclosed a more plausible example, in the case of *Pole-Carew v Craddock*.[91] In that case, the court was concerned with a 1790 statute, under which a ferry was established, and which granted the proprietors exemption from the payment of "any tax, rate or assessment whatsoever…" It was held that this exemption extended to income tax, even though that tax was first imposed after 1790. The context, and the statutory wording, are of course quite different from the present. However, the case may be taken as illustrating a more general principle, that when one is looking at the combined effect of two statutes, concerned with the same general subject-matter, even if separated by a substantial period of time, the intention of Parliament is not necessarily to be derived solely from the most recent. They must be looked at together. Such an approach provides a possible answer to concerns about applying a 1965 definition to a statute passed a century before.

87. The most obvious objection to this interpretation is that it offends the ordinary presumptions to which I have referred, by extending penal provisions (without clear words to that effect) to land which would not otherwise have been within their scope. There is less objection in relation to historic class *c* greens. As has been seen, the criteria for them would have given rise to a presumption of customary rights at

common law, and the registration process gave plenty of opportunity for owners to resist the process. The risk of interference with established rights was slight, and readily justifiable by the overall policy objectives of the Act.

88. The same cannot be said of modern class *c* greens. However, as I have said, they were given implicit statutory endorsement in the 2000 Act, and no amendment was made to section 10. It must be assumed that Parliament intended them to have the same legal incidents as historic class *c* greens. The compatibility of that extension with Convention rights may be open to question, but that is not an issue before us.

89. A further possible difficulty with this interpretation is that it may involve a different approach from that applied to "common land", which is also within the scope of section 10. That part of the definition has given rise to its own difficulties, but there is the important difference that both the components (common land and manorial waste) were recognised legal concepts apart from the Act.[92] That comparison should not, in my view, prevent the court from giving a practical meaning to section 10 as applied to town and village greens.

90. Accordingly, I would answer question (i) in the negative and (ii) in the affirmative.

(b) The effect of the 2000 amendment

91. Two issues arise:

i) Should the recreational use "continue" to the date of the application, the date of registration, or some other date?

ii) Must any application made after the commencement date of the 2000 Act be considered exclusively in accordance with the amended definition?

92. Although the practical effects of these questions are very important, the answers to both seem to me reasonably clear, on the ordinary reading of the statute:

i) The use must "continue" to the date of registration. That is because, in the absence of any other indication,[93] the words "continue to do so" can only be taken as referring to the time when the statute requires the definition to be applied; that is the date when the register is amended under section 13. That is the only formal step referred to in the statute itself. It is also the date at which registration is made conclusive by section 10. In this context, unlike that of the initial registration process, there is no statutory equivalent to the prior step of "provisional registration".[94] The earlier procedures, starting with the application, are the creation of the regulations, and cannot in my view be taken to govern the interpretation of the statute.

ii) The application must be considered under the *amended* Act. This is because, as from the commencement of the 2000 Act, an application can only be made under the Act as so amended. Unless preserved by some specific transitional provision (of which there are none in this statute) or some general provision of the Interpretation Act, the unamended definition is dead, and cannot be resurrected.

93. Lightman J took a different view on both points. He thought that the continuation of the use need only be up to the time of

> "… the application for registration or of the commencement of proceedings vindicating the existence of the Green."[95]

He reached this view, as I understand it, not on the wording of the statute, but by reference to its supposed objectives. He said:

> "It cannot sensibly require…continuation until the date of determination of the application by the registration authority or judgment by the court, for such a construction would enable the landowner in all cases to defeat a claim to the existence of a Green by placing a notice in appropriate terms on the land in question (such as has been placed in this case) after the application has been made or proceedings commenced and before the determination or judgment and accordingly frustrate the purpose of the legislation…
>
> I do not think that the provision made in (1A)(b) for the making of regulations in any way weakens this argument. The legislation must have been intended to operate sensibly and effectively in any interim period, which might be (as it has been) protracted, until the regulations were made."[96]

94. I agree that a consequence of my interpretation is that the owner may be able to take action to bring the qualifying use to an end, and that this is likely to limit substantially the opportunities for registration of new class *c* greens. However, I do not accept that this reading is so obviously unreasonable, or contrary to the legislative intention, that it must be rejected.[97] It means simply that the landowner, who otherwise will be deprived by operation of law of the effective use of his land, is given a final opportunity to assert his rights.[98] As I have said, the history of the 1965 Act gives no support for a broad interpretation of the provisions for new greens. Indeed, a restrictive view can help to provide an answer to possible human rights objections. If the landowner fails to assert his rights, even at this late stage, then it may be legitimate to infer that the land has been dedicated or abandoned to recreational use,[99] and to record that fact by registration as a class *c* green. Parliament gave the Secretary of State the power to limit the landowner's options by prescribing a different time limit. That power not having been used, I see no reason for the court to take over that task, and no proper basis on which it could do so.

95. On the second point, Lightman J's reasons for taking a different view were more fundamental. He thought that that the answer depended on the application of presumption against retrospectivity:[100]

> "The answer depends on whether in enacting the amended definition Parliament can be taken to have intended to take away the status as a Green of land which had previously become a Green and registrable as such and with it the protection of the 19th Century Legislation and the local

> inhabitants' rights over it which (as I have held) attach to that status.
>
> In my view Parliament cannot be presumed to have intended any such thing. If Parliament had any such intention, it would surely have made its intention plain. There is a presumption against retrospectivity of legislation…"[101] (emphasis added)

96. On any view, that approach loses its force if, as I think, class *c* status carries no implication that the inhabitants have rights over the land. In any event, I would question with respect whether the answer is to be found in the principles to which the Lightman J referred. He was not addressed on the effect of section 16 of the Interpretation Act 1978, which in my view provides the correct framework for considering such issues.

97. Section 16 provides "general savings" applicable on the repeal or amendment of an Act, applicable in the absence of specific transitional provisions. In particular, it provides that repeal of an enactment does not, unless the contrary intention appears:

> "(b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;[102]
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that enactment…"[103]

None of these savings is relevant to Miss Robinson's case. She took no steps under the unamended statute; she acquired no rights; and no penalties were incurred.

98. Accordingly, in my view:

i) Under issue (iii), the use must continue until the date of registration;

ii) Under issue (iv), the application must be considered under the Act as amended.

(c) Free-standing periods of use

99. Issue (v) raises the question whether the application can succeed on the basis that the land "became" a village green at the date stated by Miss Robinson in her application (1st August 1990), or some earlier date. This question takes on critical importance if, as I have held, the use must continue down to the date of registration, and if the notices erected by the City Council in early 2003 had the effect of ending the qualifying use.

100. Again I will deal with this issue shortly, because my conclusions as to the substantive effect of registration seem to me to provide the answer also to this question. The 1965 Act created no new legal status, and no new rights or liabilities, other than those resulting from the proper interpretation of section 10. Since that section only takes effect in relation to any particular land on registration, there is no legal basis for

treating that land as having acquired village green status by virtue of an earlier period of qualifying use. The mere fact that it would at some earlier time have come within the statutory definition is irrelevant, if it was not registered as such. If this view is correct, then the interesting points raised by Lightman J's discussion of this issue[104] do not arise.

(d) Amendments to the application

101. Three particular proposed amendments were the subject of issues (vi) to (viii). Issue (vi) was whether the application could be treated as relating to 20 years ending at a different date to that specified in the application. Lightman J held that it could. Issue (vii) concerned an application proposed by Miss Robinson to exclude two areas, one being the area of the reed beds and the other a 10 metre strip along the western boundary of the scrubland. Her reasons appear from her letter of 21st October 2002:

> "The reason for (1) is that access to the Reed Bed for recreational purposes is not part of my claim, and none of my witnesses lays claim to it either. It seems simpler, to save the Inspector's time, to exclude this area from the argument.
>
> The reason for (2) is that I have received assurance that the County Council has commissioned a feasibility study in respect of a westerly route for the proposed access road which would serve the new primary school to the south of the Trap Grounds. This alternative route avoids the sensitive wildlife habitats that I seek to protect. I am therefore prepared to renounce my claim on the strip of land in question."

Issue (viii) was whether, if Miss Robinson was not able to make such an amendment, it was open to the County Council to accept the application in respect of part only of land included in the application.

102. I have very little sympathy with the arguments presented by the two councils on these issues. They seemed to reintroduce a degree of technicality, reminiscent of the elaborate pleading arguments found in the 18th century cases, and long since abandoned in modern court procedure. The beginning and end of the argument appeared to be that the 1969 Regulations do not in terms permit an application to be amended, and therefore no such power is to be implied.

103. It is true that the procedure is initiated by an application, and the applicant therefore bears the primary responsibility for getting the application right and producing the evidence to support it. However, as has been recognised in numerous cases, it also has a public element. In *Whitmey*, Arden LJ referred to the advantages of the informality and "flexible approach" allowed by the non-statutory inquiry procedure.[105] The same approach should in my view be applied to the procedure generally. It is also relevant that the registration authority has a general duty to "maintain" the register.[106] This carries with it, in my view, a duty to ensure that the procedures are fair and orderly, and that the register itself is accurate and accessible.

104. Mr Chapman had advised that Miss Robinson had no absolute right to amend the application but that the authority had a discretion to permit it. Furthermore, he advised that the authority could for proper reasons determine the application for a lesser area than that proposed in the application. I agree respectfully with that approach. In relation to the issue of amendment he explained his views as follows:

> "My view is that an applicant under s 13 has no absolute right to amend or withdraw an application. It is not unknown for campaigners to make and then purport to withdraw and resubmit s 13 applications as a tactic to inhibit the development of land. I should make it clear that there is no question of such a tactic in this case but I consider that the registration authority must have a power to insist on determining a duly made application so that the status of the land is clarified in the public interest. However I consider that it is, as a matter of common sense, implicit in the 1969 Regulations that a registration authority does not have to proceed with an application that the applicant does not wish to pursue (whether wholly or in part) where it is reasonable that it should not be pursued. It would be a pointless waste of resources for a registration authority fully to process an application that the applicant did not wish to pursue whether wholly or in part unless there were some good reason to do so.
>
> In the present case, the city council as landowner has made it clear, through its counsel, that it does wish to have the status of the Trap Grounds as whole determined. I consider that it is a reasonable wish on the part of the landowner to know whether its land has become a town green or not. I can see no good reason why the status of the reed beds and the 10 metre strip should remain in limbo. The fact that Miss Robinson would not object to use of the 10 metre strip as access road to the new school is entirely irrelevant to the question whether that land has become a prescriptive town green. My advice to the county council as registration authority is (a) that Miss Robinson does not have power to insist on amending her application, (b) that the county council has power to allow an amendment where it is reasonable to do so, (c) that in the present case it would be unreasonable to allow the proposed amendment because the city council as landowner wishes to have the status of its land determined, and (d) that the county council should determine the original application as a whole."

That approach, with respect, seems to me sensible, and unobjectionable as a matter of law, although the final decision remains a matter for the discretion of the registration authority.

105. With regard to the Council's own powers in considering the application, he advised that they should exclude the reed beds and part of Frog Lane, on the grounds that

there was no evidence of material recreational use of those areas, but that the remainder should be included on the register. This included the 10 metre strip alongside the railway, which he considered was indistinguishable from the rest of the scrubland. Again, as a matter of law, I see no error in that approach, although I express no view on the factual conclusion.

106. As I have said, I am unconcerned that this involves a departure from the strict words of the regulations. If authority is required for that, I am content to rely on Lord Keith's approach in *Inverclyde District Council v Lord Advocate.*[107] That case concerned the submission of details pursuant to an outline planning application. The conditions in the outline permission imposed a time limit for the submission of details. The general development order governing such applications provided for the form of application, but there was no specific provision for amendment. Furthermore, the Act provided that an application for approval of reserved matters, if made after the date by which the conditions require it to be made, should be treated as not made in accordance with the terms of the permission.[108]

107. On the facts of that case an application for submission of details had been made within the time limit. However, following an inquiry the Secretary of State had indicated that approval would be appropriate in respect of a more limited area, and had invited submission of detailed plans and information relating to the reduced area. The authority argued that such an amendment would be outside the scope of the original permission. They accepted that an amendment was possible within the three-year period, but submitted that once that period had come to an end no amendment whatever could validly be made.

108. Lord Keith rejected this argument:

> "It is to be observed that neither in the Act of 1972 nor in the Order of 1975 is any procedure laid down for the manner in which applications of this nature are to be dealt with, apart from the provisions about entry in the register. *This is not a field in which technical rules would be appropriate, there being no contested lis between opposing parties. The planning authority must simply deal with the application procedurally in a way which is just to the applicant in all the circumstances.* That being so, there is no good reason why amendment of the application should not be permitted at any stage, if that should prove necessary in order that the whole merits of the application should be properly ascertained and decided upon…." (emphasis added)

In that statutory context, however, having regard to the time limit on applications, he accepted that:

> "… an amendment which would have the effect of altering the whole character of the application, so as to amount in substance to a new application, would not be competent."[109]

109. I would respectfully adopt the italicised words as an appropriate guide to the functions of a registration authority under the 1965 Act, subject to taking account of the positions of the other parties including the public. It is unnecessary in this case to consider the precise limits of the power of amendment, since Miss Robinson's proposed amendments were clearly within them, in my view. They involved no extension of the area of the earlier application, and made no material change to the substance of the rights claimed. The same applies to the change of date, to which the City Council itself had made no objection

110. Mr Laurence suggested that such flexibility would impose an impossible burden on authorities, who would have to consider a wide variety of potential variations. I do not accept that. Under Mr Chapman's approach, the authority is master of the procedure, and should have no difficulty in applying a common-sense approach to ensure that the resulting registration is as accurate as it can be on the available evidence and that all interests are properly protected. Of course, if amendments are made to the application which are likely to affect the interests of other parties including the public, the authority will need to consider what publicity arrangements are necessary to ensure that adequate notification is given. I see no need, as Mr Laurence suggested, for this Court to lay down precise guidelines. The practical problems involved are no greater than those involved in setting up a non-statutory inquiry, a practice which has grown up without any statutory underpinning or formal guidance of any kind.

111. Lightman J held that there was no power for the applicant to amend the application or for the authority to authorise an amendment of the application. On the other hand he accepted that the authority could, following its consideration, decide to register a lesser area.[110] The practical consequence of Lightman J's approach, therefore, may not be much different to that which I have held to be correct. If it is open to the authority to register a lesser area, then the applicant, without purporting to amend the application, can simply elect to present no evidence in support of that part of her case.

112. In any event for the reasons I have given I would answer in the affirmative questions (vi), (vii) and (viii).

(e) Evaluation of evidence

113. Two particular points were raised:

i) the relevance, taken with the evidence of use of the tracks, of the finding that only about 25% (or less) of "the scrubland" is reasonably accessible;

ii) the relevance of the existence or potential for the existence of public rights of way, in particular over the circular track.

114. Lightman J dealt with these issues at some length. However, I think the pith of his analysis can be found in two passages. On the first point, he said:

> "There is no mathematical test to be applied to decide whether the inaccessibility of part of the land precludes the whole being a Green… Greens frequently include ponds. They may form

> part of the scenic attraction and provide recreation in the form of e.g. feeding the ducks or sailing model boats. Further overgrown and inaccessible areas may be essential habitat for birds and wildlife, which are the attractions for bird watchers and others…"

He urged the registration authority to take "a common sense approach" in deciding whether, having regard to its physical characteristics, which may have changed over the twenty years, the whole of the land (or some separately identifiable part of it) satisfies the definition.[111]

115. On the second point, he noted correctly that use for recreational walking is capable of founding a case of deemed dedication of a highway, unless merely ancillary to other recreational activities.[112] Where the recreational use claimed in support of a class *c* green included the use of an identifiable track capable of supporting a presumption of a right of way, he said:

> "The answer must depend how the matter would have appeared to the owner of the land)… Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year…"[113]

116. He had begun this part of his judgment by emphasising that guidance on such factual issues could only be of the "broadest kind";[114] and he concluded it by repeating that:

> "The question must in all cases be how a reasonable landowner would have interpreted the user made of his land."

Without questioning the common sense of many of the points made in this part of his judgment, I do not think that it is appropriate for this court to seek to review it in detail. On such matters of evaluation of evidence it is unusual for an appellate court to comment until the facts have been found. They raise issues of fact and degree for the decision-maker, which may not be easy to resolve, but do not for that reason become issues of principle. Indeed, section 14 of the Act contemplates that the role of the High Court will normally be retrospective. While I readily accept that the issues of principle dealt with in the earlier part of this judgment were suitable for advance consideration as an exception to the ordinary rule, I am not persuaded that same applies to issues (ix) and (x), nor that it is possible for this court properly to provide detailed answers to them.

Conclusion

117. In summary, my answers to the issues on which "rulings" have been sought by the County Council are:

(i) Registration of land as a class *c* green does not of itself confer or imply any rights on the part of local inhabitants (however defined) to indulge in sports and pastimes on that land;

(ii) Such registration is conclusive that the land is a town or village green within the scope of (inter alia) section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876;

(iii) The words *"continue to do so"* in the amended definition mean that the lawful sports and pastimes must continue to the date of registration;

(iv) Any applications for registration of land as a class *c* green made on or after 30 January 2001 automatically engage (and engage only) the amended definition;

(v) The application could not as a matter of law succeed on the basis that the land became a green on 1 August 1990;

(vi) The County Council has power to treat the application as if a different date had been specified in Part 4, and to determine the application on that basis;

(vii) As a matter of law, it would be open to the County Council on proper consideration to permit Miss Robinson's application to be amended to refer a lesser area, as proposed by her;

(viii) As a matter of law, it would be open to the County Council on proper consideration to register as a green part only of the land included in the application;

Issues (ix) and (x) are matters of fact and degree for evaluation by the authority, the question being how a reasonable landowner would have interpreted the user made of the land.

118. The order made by Lightman J contained a series of detailed declarations on these issues. Subject to any further submissions, I do not think this is necessary. It should be sufficient simply to declare that the authority is required to consider the application in accordance with the principles stated in this judgment.

119. Finally, I add this comment. The answers given in this judgment (particularly to issue (iii)) may not provide much comfort to Miss Robinson herself, or the other users of the Trap Grounds. On the other hand, I hope that they will assist the wider objective of providing a coherent and transparent system for the protection of village greens in the long term. They should also provide a clearer basis for amending legislation. If the law is as I have stated it, then the task should not be as complex as DEFRA seem to fear. The register can be taken as a definitive statement of the extent of town and village greens for the purposes of the existing (antique) statutory regime. What is needed is modern legislation to provide similar protection and the means of regulation. If it is thought right to give general public access to registered greens for

"sports and pastimes", the legislation needs to include machinery for their management, and for protection of any existing customary rights.

120. Amending legislation is urgently needed. In my view, it would be a sad betrayal of the work of the Royal Commission, and of all those who have worked for the protection of village greens before and since, if the opportunity offered by the current Commons Bill were to be missed.

Blackburne J:

121. I agree.

Peter Gibson LJ:

122. I also agree.

[1] Report of the Royal Commission on Common Land 1955-58 (Cmnd 462) ("The Royal Commission") para 18

[2] *R v Oxfordshire CC ex p Sunningwell Parish Council* [2000] 1 AC 335 at p 347F, per Lord Hoffmann,

[3] Gadsden, Law of Commons (1988) para 13.01

[4] Mr Vivien Chapman, the barrister appointed by the County Council to hold an inquiry into Miss Robinson's application (see below)

[5] See Commons Registration (General)Regulations Schedule 2 Part 1 No 5 (model entry for "Goose Green")

[6] para [45]

[7] *R v Suffolk CC ex p Steed* (1996) 70 P&CR 487 at p 504.

[8] *Steed* (CA) 75 P&CR 102 at p 112-3. The substance of the Opinion had been published by the Open Spaces Society in 1995 in "*Getting Greens Registered"*.

[9] [2004] 3 WLR 1342

[10] The Common Land Policy Statement 2002 ("the CLPS") proposed a provision enabling application for registration to be made up to two years after the user ceased and stated there would be consultation on the draft regulations (see para 48). No such draft regulations have yet made their appearance.

[11] (2002) 116 Harvard LR 19, 28-9, quoted by Baroness Hale in "A Supreme Court for the United Kingdom?" Legal Studies Vol 24 (March 2004) p42.

[12] *New Windsor Corporation v. Mellor* [1975] 1 Ch 380 (per Lord Denning MR p391-3, Browne LJ, p395G).

[13] Most recently in the 2002 CLPS (paras 51, 60)

[14] See *R v Suffolk CC, ex p Steed* (1996) 70 P&CR 487, 493.

[15] *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, 917-8

[16] Since the hearing, a Press Notice on the Government's proposals for common land, following consultation, was issued on 17th February 2005.

[17] See Halsbury's Laws Vol 44(1) Statutes para 1423

[18] *Ibid* paras 1456, 1464.

[19] Article 1 of the First Protocol (Protection of Property)

[20] per Lord Walker, in *Beresford* at para 71

[21] *Sunningwell* p347C

[22] *New Windsor* at p386-7

[23] See Dr W. G Hoskins, History of Common Land and Common Rights (App II to the Royal Commission report) at para 54

[24] Megarry & Wade, Law of Real Property (6th ed) para 18-078

[25] *Brocklebank v Thompson* [1903] Ch 344, 350, per Joyce J.

[26] (1665) 1 Lev 176

[27] [1775-1802] All ER Rep 571

[28] Charles Elton, Treatise on the Law of Commons and Waste Lands" (1868) pp285-291

[29] Elton, *op cit* p288. It appears from a footnote that this proposition was based on a report of the Open Spaces Select Committee 1865, 1 Rep 26.

[30] *Schwinge v Dowell* (1862) 2 F&F 845; *Chapman v Cripps* (1862) 2 F&F 864

[31] (1876) 24 WR 603, 604

[32] [1896] 1 Ch 308

[33] *New Windsor* at p 386

[34] Sir Robert Hunter, Preservation of Open Spaces – a Practical Treatise (1896) p175. The author is described on the title page as "Solicitor to the Post Office, Formerly Honorary Solicitor to the Commons Preservation Society".

[35] *Ibid* p175.

[36] p181. Suggestions for evidence of "assertion of right" were the placing of a maypole on the green, the reservation of an area for the village cricket club, or an entry in the vestry-books showing a "claim of right".

[37] pp178-9. He referred to the sequel to *Fitch v Rawling* (*Fitch v Fitch* (1797) 2 Esp 543), in which it had been held that it was not a lawful exercise of the custom "to enter upon the land when the grass had been allowed to grow and had been cut for hay, and to throw the hay about and mix it with gravel and spoil it."

[38] (1863) 1 H&C 729

[39] (1875) 1 Ex D 1

[40] at p3, per Kelly CB. The requirement for enjoyment to be at "seasonable times" was implied in the more general allegation (p 4, per Cleasby B).

[41] p4

[42] Hunter, p181-2

[43] Unreported, except inaccurately (according to Hunter) in the Times, 30th March 1893.

[44] (1894) 10 TLR 310

[45] Acquisition of Land Act 1981, s 19(1),(4).

[46] *Op cit* p184, 186

[47] [2000] 1 AC at p 347-8

[48] See e.g. Royal Commission report para 216, where they describe the task of establishing ownership of common land as "… having to grope around in a mist of doubt and uncertainty – as bewildering as those mists which sometimes descend on the commons of Dartmoor…"

[49] paras18-19

[50] p276

[51] paras 370-2.

[52] para 403.

[53] See *Beresford* at para 72, per Lord Walker.

[54] In relation to historic greens, efforts by the landowner to interrupt a recreational use, in the face of evidence of a long history of such enjoyment, would be likely to be defeated by the presumption that the use was based on customary rights: see e.g. *Re Village Green, Waddingham, Lincs* (1972) 24/D/3, where the Chief Commons Commissioner upheld customary uses established by evidence "during the whole period of living memory", even though the objectors had "discouraged it a few years ago by starting to use the land as a garden".

[55] Gadsden, *op cit* para 13.20

[56] A suggestion that such a role should be implied (made in an article by the present Chief Commons Commissioner, Edward Cousins) was rejected by this court in *Whitmey,* paras 3 and 18-19

[57] *New Windsor Corp v Mellor* [1975] Ch 380, 391H (Lord Denning MR), 395G (Browne LJ), 396C (Brightman J)

[58] The same four categories were repeated in a ministerial circular in 1971, although it was said that "the majority" of new applications were expected to be in respect of substituted land: MHLG Circular 3/70 para 4-5

[59] Although arguably such substituted greens are not strictly within any of the three classes of the statutory definition, there was sensibly no dispute before us that they are properly registrable (if only, because the "incidents" of the substituted land have to be the same).

[60] Gadsden mentions a few such applications in the 1980s: *op cit* para 13.30. However, the advice of the Open Spaces Society (see "Getting Greens Registered") seems to have favoured waiting a full 20 years from the end of July 1970 (the cut-off date for rights under section 1(2) of the 1965 Act), and that accordingly 1st August 1990 should be given in the application as the date when the land became a green. This advice was followed by Miss Robinson in the present case.

[61] *Steed* (Carnwath J); and *Ministry of Defence v Wiltshire CC* [1995] 4 All ER 931 (Harman J).

[62] *Sunningwell* at p 348D-E, per Lord Hoffmann

[63] *R v Suffolk CC ex p Steed* (CA) 75 P&CR 102, 111-2

[64] *Sunningwell* p350H, 355-6

[65] p353A This followed the discussion of Lord Blackburn's speech in *Mann v. Brodie* (1885) 10 App Cas 378, 386

[66] *Ibid* p354F-G, summarising the earlier discussion

[67] *Sunningwell* p353F-354A

[68] Not even, for example, in relation to cricket, which, as Lord Hoffmann observed, was unknown in 1189, and unlawful for some centuries thereafter (p357B). The only example given by Lord Hoffmann (*Bryant v Foot* LR2 QB 161) was about customary charges for marriage services.

[69] Per Lord Denning MR, *Corpus Christi College v Gloucestershire CC* [1983] 1 QB 360, 363G (a case relating to common rights).

[70] As in the Royal Commission's understanding that the "villagers… know what they mean by their 'green'".: see para 46 above.

[71] *Steed* at p 503-4. In *Sunningwell*, Lord Hoffmann made reference to this passage (p357D), but only for my unremarkable observation that in modern life informal recreation such as "an evening stroll with a dog, or children at play" might be the main function a village green.

[72] The same observation might be made in relation to common rights; for example, the use for 20 years of a defined area of downland for grazing cattle from a particular tenement, as in *TehidyMinerals Ltd v Norman* [1971] 2 QB 528, 545 (CA) (although the court in that case found that the use had been "in the assertion of a right to do so": see p545D).

[73] I referred to *Beckett Ltd. v Lyons* [1967] Ch 449, 472C, where in relation to a claim by inhabitants of the County of Durham to a customary right to collect seacoal, Harman LJ commented that "it would at least be necessary to show that the coalgatherers supposed themselves to be gathering coal in right of their inhabitancy of the county…" This aspect of the judgments in *Beckett* was not referred to in *Sunningwell*.

[74] Including an article by J G Riddall, "A False Trail" [1997] Conv 199, in which the author discusses the erroneous course taken by recent cases on that subject, again without reference to customary recreational rights.

[75] *Sunningwell* p357A

[76] p357D

[77] p357D-E

[78] p357F-G

[79] p358B.

[80] Cf the Inclosure Act 1845 s 73 (land allotted for "the parish and neighbourhood") where the word "neighbourhood" seems to have a wider connotation.

[81] See the discussion of the issues raised by this aspect of the new definition in *R (Cheltenham Builders Ltd) v South Gloucestershire DC* [2004] JPL 975 (Sullivan J).

[82] See Lightman J at [14]

[83] Para [36]

[84] *New Windsor* at p 392-3

[85] Para [11]

[86] *Steed* (CA) 75 P&CR 102, 114-5

[87] para [43]

[88] For a convenient list of "customary" activities which have been upheld by the courts, see Gadsden *op cit* para 13.03

[89] *Whitmey,* paras 36-7. I reject Mr Laurence's suggestion that the court made a binding decision on the point. There was, and needed to be, no detailed consideration of the point. Looking at the judgments as a whole, it is clear that the court was content to assume the point in Mr Whitmey's favour, for the purpose of the human rights issue, which was at the heart of the case.

[90] He referred to Bennion on *Statutory Interpretation* (4th Ed, 2002) at p762, section 288(1) – (3), a passage endorsed by Sir Richard Scott V-C in *Victor Chandler International v. Customs & Excise Commissioners* [2000] 2 All ER 315 at p.322F

[91] [1920] 3 KB 109.

[92] See *Corpus Christi* (above) and *Hampshire CC v Milburn* [1991] 1 AC 325

[93] Cf Highways Act 1980 s 31(2), which specifies a period of 20 years prior to the date when the right of the public is "brought into question".

[94] Even in that context, it was held that the facts were not to be treated as frozen at the date of provisional registration, but had to be considered in the light of the position at the date of determination: *CEGB v Clwyd CC* [1976] 1 WLR 151 (Goff J). Although questioned in the *Corpus Christi* case (at p368G), this case was never overruled.

[95] He cited in support an unreported decision, *Caerphilly County Borough Council v Gwinnutt* 16 January 2002 (HH Judge Hywel Moseley QC).

[96] para [20]. The same view was taken by Sullivan J in *R (Cheltenham Builders Ltd) v South Gloucestershire CC* [2004] JPL 975, 991.

[97] Although we were referred to statements made in Parliament at the time of this amendment, it was not suggested that they provided a clear answer on this issue.

[98] There is a parallel in the changes recommended by the Law Commission to the traditional law of adverse possession (now enacted in the Land Registration Act 2002). They include a requirement of notice to the landowner before the squatter's title is finally registered. This is seen as required to "strike a more appropriate balance between landowner and squatter": see *"Land Registration for the 21st Century"* LC 171, para 14.4.

[99] It might, for example, be an unregistered former village green, of which the ownership is unknown and on which the traditional use has continued unchecked.

[100] See e.g. per Lord Brightman, *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 AC 553 at p558 E-F

[101] Paras [66] – [67]

[102] See *Chief Adjudication Officer v Maguire* [1999] 1 WLR 1778 for an authoritative discussion of the relevant authorities under (c).

[103] It is also unnecessary in the context of the present case to consider the possible application of s 16(1)(e) (pending investigations or legal proceedings) to a case where the application for registration was made before the commencement of the 2000 Act, but considered afterwards.

[104] Paras [50] to [65]

[105] She cited *Corpus Christi College v Gloucestershire CC* [1983] QB 360, 366-367 (Lord Denning MR), 379 (Oliver LJ). Although there had been a difference in that case on the issue of burden of proof (resolved by Slade LJ in *Re West Anstey Common* [1985] Ch 329, 341-2), there was no difference as to the need for a flexible approach. Lord Denning referred to the process "as an administrative matter – to get the register right – rather than as a legal contest"; similarly, Oliver LJ accepted he need for "greater latitude both as regards proof and procedure than the judge deciding a civil dispute inter partes."

[106] 1965 Act s 3

[107] (1981) 43 P&CR 375

[108] The relevant provisions are set out at pp395-397

[109] p397

[110] paras [72] – [73] and [82] – [91]. This accorded with the approach of Sullivan J in *R (Alfred McAlpine Homes Ltd v Staffordshire County Council* [2002] 2 PLR 1

[111] para [95]

[112] *Dyfed CC v. Secretary of State for Wales* (1989) 59 P&CR 275, 279 (a circular way round a lake, used for swimming and sunbathing)

[113] para [102]

[114] para [92]